BOOK REVIEWS.

THE AUSTINIAN THEORY OF LAW: being an edition of Lectures I, V and VI of Austin's "Jurisprudence," and of Austin's "Essay on the Uses of the Study of Jurisprudence," with critical notes and excursus. By W. JETHRO BROWN. London: John Murray. 1906. pp. xv, 383.

Dr. Brown's chief object in this excellent work is to present for students' use a statement with critical interpretation of the theory of sovereignty and law evolved many generations ago by that celebrated writer and lecturer on Jurisprudence, John Austin. With boldness and skill, which calls from the author a word of apology, he has edited out of the well-known lectures all of the invective and much of the repetition which detracted from the pleasure in reading them, reducing the bulk by at least one-third, and at the same time has suggested a certain reconstruction of the doctrine. He has added to Austin's text a series of valuable notes and questions designed rather to assist the student in criticising and interpreting than to afford a *vade mecum* for examination purposes, for Austin's style is heavy and many of his passages are obscure if not impossible of understanding.

In the Excursus the author treats of "The State," "Sovereignty," "The English Judge As Law-maker," "Customary Law in Modern England," "A Consideration of Some Objections to the Conception of Positive Law as State Command" and "The Sciences of State Law." He lucidly presents an exposition of certain topics which to him seemed to demand fuller discussion, upholding the views of Austin where he can or reconstructing them where he cannot, pointing out controverted passages and the well-deserved criticisms of later writers, and his arguments are strong and well martialed. Excursus A treating of "The State" is the first and probably the best of the series. Beginning with the group life of two individuals engaged in a common undertaking, he builds up the theory of the corporation, and tracing the stages of its development he finally presents the State, in which he recognizes the personality of the highest and most developed social group. To him the State is a public, juristic, real, legal person in a classification of persons in a wide sense, differing from the corporation in this: "Both company and State are organized groups, but in the mind of the component individuals which go to form them, the social self in one case is strictly limited, whilst in the other it is unlimited, extending in its range over the whole compass of individuality."

Dr. Brown in Excursus C maintains that "judges may add to the existing law by the indirect process of judicial decision." He admits that judges cannot overrule statutes and says that if judicial interpretation ever defeats the legislative purpose it is because the legislative purpose has been badly expressed rather than because the judges have legislative ambition. He supports the doctrine of Austin by holding that the judge is the delegate of the sovereign. "The judges can and do make law," he says, "but only in strict subordination to Parliament, which may set at naught their judgments and repeal the law which they have established." Parliament

may reverse distasteful decisions, annul the principles and regulate the tenure and authority of the judges, but "the rule which the judges lay down is enforced, not by might of their own, nor by the might of the organized community, but by the might of the sovereign power." If sovereignty is located in the State itself, as the author says it is, his contention meets the case of the United States Supreme Court; but if it is in the Austinian "air" the contention is insupportable. The fault with Austin, Dr. Brown points out, is that he "confuses political with legal sovereignty. But of whichever of these he is thinking, he invariably looks upon the sovereign as a superior person or body who imposes his will on inferiors." Dr. Brown's view of customary law is that "custom is law when it can be held that the judges are bound to enforce it." "In the view I hold of the matter," he says, "we have reached a stage in our legal history when a theory of customary law inevitably leads on to a theory of judicial practice in general."

Austin's definition of a law has been criticised severely by such eminent authorities as Mr. James Bryce, Prof. Holland and Sir Henry Maine. Dr. Brown, in a footnote to the text and in Excursus E, contends against these weighty arguments and says:

"Such differences of opinion with respect to the definition of sanction and the essence of command are referred to, not to confute Austin, but to bring out the meaning and significance of his position. . . . If positive law is something more than command, it is at least command, and is sanctioned typically by penalties. In this connection a very practical question may be asked: Does the Austinian conception of sanction cover the cases described as sanctions of nullity? The question is illustrated by the case of *Cowan* v. *Milbourn*, L. R., 2 Exch., 230. In that case the defendant agreed to let rooms to the plaintiff, but after discovering that the rooms were intended to be used for the purpose of a blasphemous character, he refused to stand by the agreement. It was held by the court that, since the object of the contract was illegal, the contract could not be enforced at law. Baron Bramwell, in his judgment, said: 'It is strange there should be so much difficulty in making it understood that a thing might be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law.' The command of the State implied in the judgment of Baron Bramwell may be expressed as a prohibition of the making of certain kinds of contract—prohibition sanctioned, not by a positive penalty, but by a mere refusal to enforce the contract. Can we regard this negative punishment as included within the Austinian conception of sanction? 'I agree,' wrote Sidgwick, 'with critics of Austin in thinking that the conception of 'command'—implying announcement of wish, together with power and purpose of punishing its violation—can only be applied in an indirect way, and by a process of inference sometimes rather complicated, to many of the rules that make up the aggregate of civil law. Still I think that Austin's conception is always applicable, if it is interpreted as meaning only that the expectation of some penalty, to result from the action or inaction of government or its subordinates, constitutes a motive for con-

forming to the rules we call 'laws,' and supplies a broadly distinctive characteristic of such rules; though the penalty (1) may consist only in the enforced payment of damages to a private individual injured by the violation of the rule, or (2) may be merely negative, and consist in the withdrawal from the law-breaker of some governmental protection of his interests to which he would otherwise have been entitled.'"

The author concedes the untenability of Austin's interpretation of the source and nature of the command and says that the conception of law as command is inadequate for the purposes of legal science. He goes further and says that law affirms rules of conduct and urges the inclusion of three additional elements as follows: "The sum of the rules which go to make law is a unity; it is a unity which is also a growth; it is a growth which is also something distinguishable from a mere natural product, being in fact an expression of human intelligence and design—'a growth directed by conscious foresight.'"

On the whole Dr. Brown's work is a valuable contribution to the literature on the subject of jurisprudence, but it can hardly restore the power and prestige of Austin.

REGULATION OF COMMERCE UNDER THE FEDERAL CONSTITUTION. By THOMAS H. CALVERT. Northport: Edward Thompson Co. 1907. pp. viii, 380.

This is an orderly, well-written, and well-arranged statement of the judicial decisions on the subject considered. It is the work of a digester, rather than of an original thinker, or of an historical student. As compared with the recent work of E. Parmalee Prentice on a similar topic, it exhibits a much less careful study of the conditions out of which the governing provisions of the Constitution of the United States arose, and in the light of which they may be the better understood, and a much more careful study of the manner in which these provisions have been in fact construed by the courts.

Mr. Calvert, however, can reason clearly, and when he finds a point not covered by some judicial precedent, does not hesitate to examine it on principle. Thus, while admitting that Congress can regulate the manufacture of pure foods, so far as necessary to prevent fraud on buyers of goods upon the inter-state and foreign market, he thinks that there could be no general exclusion from inter-state commerce of commodities not manufactured under federal supervision, or produced by child labor (pp. 115, 117).

He does not anticipate any embarrassment, in the fixing of railroad rates by the Inter-State Commerce Commission, from the constitutional prohibition against preferences to the ports of one State over those of another. This he regards as designed to protect, not the interests of any one port in comparison with those of another, but those of all the ports of one State as against all the ports of another, and as forbidding only such a direct preference as no Commission would ever be likely to adopt (pp. 176-179).

The author does not content himself with stating the ultimate conclusions of the courts. He gives the grounds which they assign for them, and thus helps towards an intelligent acquaintance with the guiding rules of